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Chairman: Mr. Simon (Vice-Chairman) ..... (Hungary)
later: Mr. Bennouna (Chairman) ..... (Morocco)

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In the absence of Mr. Bennouna (Morocco), Mr. Simon (Hungary), Vice-Chairman, took the Chair.

The meeting was called to order at 10.05 a.m.

Agenda item 138: Nationality of natural persons in relation to the succession of States (A/59/180 and Add.1 and 2)

1. **The Chairman** recalled that agenda item 138, "Nationality of natural persons in relation to the succession of States", had been considered by the Sixth Committee at the fifty-fifth session. During that session, the General Assembly had considered the draft articles on nationality of natural persons in relation to the succession of States adopted by the International Law Commission in 1999 (A/54/10 and Corr.1 and 2) and had decided to annex the text of those articles to its resolution 55/153 of 12 December 2000. That resolution had also invited States "to take into account, as appropriate, the provisions of the articles in dealing with issues of nationality of natural persons in relation to the succession of States" and recommended that "all efforts be made for the wide dissemination of the text of the articles". The General Assembly had decided to include the item in the agenda of its fifty-ninth session. In its resolution 54/112 of 9 December 1999, the Assembly had invited Member States to submit comments and observations on the question of a convention on the nationality of natural persons in relation to the succession of States, and had reiterated that invitation in resolution 55/153. The comments and observations received from Governments had been reproduced in a note by the Secretariat (A/59/180 and Add.1 and 2).

2. **Ms. Noland** (Netherlands), speaking on behalf of the European Union, the candidate countries (Bulgaria, Croatia, Romania and Turkey), the stabilization and association process countries (Albania, Bosnia and Herzegovina, Serbia and Montenegro and the former Yugoslav Republic of Macedonia) and the EFTA countries Iceland, Liechtenstein and Norway, said that the draft articles submitted by the Commission had made a significant contribution to the development of uniform solutions to the problems of changes of nationality resulting from the succession of States. They were a useful guide to practice in dealing with that issue. The European Union commended the Commission for setting up a universal instrument regulating that difficult matter and establishing clear and authoritative guidelines, which were urgently needed to resolve the problems of State succession that a number of countries had confronted over the past decade.

3. She also noted the importance of the European Convention on Nationality of 1997 which, in the view of the European Union, constituted a significant standard in questions regarding nationality. She also mentioned the Council of Europe draft Protocol on the avoidance of statelessness in relation to State succession, which built on the Commission's draft articles and contained many provisions identical to them.

4. The European Union expressed its appreciation for the comments and observations from Governments on the question of a convention on nationality of natural persons in relation to the succession of States (A/59/180 and Add.1 and 2). It would be interested in additional comments and observations, taking into account in particular one of the main objectives of the Commission's draft articles, namely, avoidance of statelessness in cases of State succession. The comments and observations should be helpful in order to discuss, at the sixty-third session of the General Assembly, whether the Commission's work on that topic could contribute to the elaboration of a convention or other appropriate instrument.

5. **Ms. Sipraseuth** (Lao People's Democratic Republic) said that her delegation appreciated the valuable work of the Commission on nationality of natural persons in relation to the succession of States. Governments should be invited to take into account, as appropriate, the provisions contained in the draft articles that dealt with issues of nationality of natural persons in relation to the succession of States. In order to address those issues properly, the possibility of adopting a convention on the subject must be considered. The adoption of a convention would contribute to resolving matters concerning nationality of natural persons in relation to the succession of States, thereby strengthening the promotion of human rights of all people in the world. Her Government would consider becoming a party to such a convention.

6. **Mr. Čízek** (Czech Republic) said that his delegation fully associated itself with the statement of the European Union on the topic of nationality of natural persons in relation to the succession of States. He recalled previous statements to the Sixth

Committee in which his delegation had expressed satisfaction with the key principles on which the draft articles on nationality of natural persons in relation to the succession of States were based and had offered comments and observations aimed at further improving the text and its commentary. The delegation of the Czech Republic had also welcomed the recommendation of the Commission, adopted at its fifty-first session in 1999, that the final set of 26 draft articles on nationality of natural persons in relation to the succession of States should be adopted by the General Assembly in the form of a declaration.

7. By its resolution 54/112, the General Assembly had decided to include the item under consideration in the agenda of its fifty-fifth session, with a view to the consideration of the draft articles adopted by the Commission and their adoption by the Assembly in the form of a declaration. At its fifty-fifth session, the General Assembly had not reached consensus on the Commission's recommendation. By its resolution 55/153 it had taken note of the draft articles and annexed them to that resolution.

8. It was neither practical nor appropriate for the current draft articles to take the form of a legally binding instrument. One of the key purposes of the draft articles was to provide States involved in the process of succession with a reliable set of legal principles and recommendations to be considered and followed in the preparation of their domestic laws on nationality. Taking into account paragraphs 3 and 4 of General Assembly resolution 55/153, his delegation felt that the said purpose had already been achieved by annexing the draft articles to General Assembly resolution 55/153.

9. **Mr. Arai** (Japan) said that the draft articles on nationality of natural persons in relation to the succession of States prepared by the Commission had provided guidance for States in managing situations relating to statelessness in cases of succession of States. They had also succeeded in striking a balance between the power of States to determine nationality and the interests of individuals acquiring nationality.

10. Article 1 of the draft articles regarded the right to nationality as a basic human right. It provided that, in the case of State succession, the individual concerned was entitled to retain one of the nationalities that he or she possessed before the succession. That rule represented an important development in international human rights law and, although it needed to be embodied in State practice, the draft articles would certainly contribute to the development of international law in that sphere.

11. With regard to the application *ratione temporis* of the draft articles, a question that required careful consideration, Japan took the view that they should not be applied retroactively. Retroactive application could cause unnecessary confusion and change the nationality of the individuals concerned. That outcome, in addition to negatively affecting the interests of those individuals, would jeopardize legal stability. The draft articles should therefore be applied only to future cases of State succession.

12. Japan was in favour of adopting the draft articles in the form of a declaration. Developments in international law had meant that the acquisition of nationality by natural persons was gaining greater significance. The right to nationality had become an integral part of human rights and awareness of the issue of nationality and the protection of individuals against statelessness was increasing. However, it should not be forgotten that the determination of nationality remained linked to State sovereignty and that the laws governing the acquisition and determination of nationality varied from one country to another. Given the wide range of practices and views, States would presumably prefer to use the Commission's draft articles as a set of guidelines or guidance for improving their laws and practices, rather than adopting them as a legally binding instrument. Consequently, the draft articles would be best used as a set of guidelines for future cases of State succession. In that connection, the work of the Commission and the practice arising from the draft articles would contribute significantly to the development of international law.

13. **Mr. Rosand** (United States of America) commended the significant efforts that had culminated in the preparation by the Commission of the draft articles on nationality of natural persons in relation to the succession of States and said that his delegation shared the general idea behind the draft articles, namely, that individuals affected by the succession of States must possess the nationality of at least one of the successor States and that the States concerned must have the power to take measures to limit cases of multiple nationality.

14. The draft articles, a number of which in their current form gave rise to reservations on the part of the United States, constituted a complex text which should be studied carefully and exhaustively by Governments. Only nine States had submitted written observations on the draft articles. It was unclear, therefore, how far the rules provided therein should be incorporated into a legal instrument. It also remained to be seen how much support that option would attract. The most suitable course of action was to defer the consideration of the draft articles until the sixty-second session of the General Assembly in order to give other States time to prepare observations and comments.

15. **Mr. Chushev** (Belarus) said that it was time to assess the importance of the draft articles on nationality of natural persons in relation to the succession of States as an instrument that could contribute to the strengthening and development of international mechanisms designed to guarantee the right of all individuals to a nationality, as set out in the Universal Declaration of Human Rights.

16. When the Soviet Union had ceased to exist, Belarus had resorted to rules based on international criteria in order to resolve problems concerning the nationality of natural persons in relation to the succession of States. Belarusian nationality had been created in 1991, when the first law on nationality had been adopted. Under that law, citizens of the former Soviet Union who had been resident in the territory of Belarus when the succession had taken place had automatically acquired Belarusian nationality.

17. That law had subsequently been amended to protect the interests of those individuals holding the federal nationality of the Soviet Union who had been born or had lived for a considerable period in Belarus but had left the country before the enactment of the law. In 2002, a new law on nationality had been passed, the provisions of which were fully in line with those of the draft articles.

18. The current law simplified the procedure for acquiring nationality and authorized those who had held the nationality of the former Soviet Union to register as Belarusian citizens provided that they had been born or had lived for a considerable period in Belarusian territory prior to 12 November 1999. Their spouses and descendants could also avail themselves of that opportunity. The system entitled individuals affected by the succession of States to choose Belarusian nationality and prevented cases of statelessness.

19. Belarus was making every effort to deepen its links with individuals of Belarusian origin and had made provision for them and for all those whose right to Belarusian nationality had been affected in some way by the principle of succession to acquire Belarusian nationality. Belarusian legislation on nationality envisaged the possibility of reducing the period of seven years of continuous residence required to acquire nationality or of waiving that requirement in respect of Belarusians, those who identified as Belarusians, and their descendants born outside the Republic of Belarus.

20. Taking into account the experience acquired in the application of national legislation in the context of the succession of States, Belarus considered that the Commission's draft articles should be adopted in the form of an international convention. For those States in favour of a more flexible international legal instrument, such as a declaration, the provisions of a convention could provide useful guidelines for the resolution of the problems posed by succession. States that did not accede to the convention could incorporate into their practice any provisions that they considered acceptable. That solution would allow for the creation of an effective legal regime that would contribute to guaranteeing the right to nationality.

21. A number of the draft articles needed further work. Article 2 should define the term "habitual residence", which was used frequently in the text. Habitual residence should mean permanent residence in the territory affected by the succession. The inclusion of that definition would serve to alleviate the problem posed for Belarus and other countries that made use of the concept of permanent residence by the absence from their national legislation of the concept of habitual residence. Belarus took the view that, in order to finalize the draft articles and secure their adoption in the form of a convention, the possibility of establishing an *ad hoc* committee or a working group of the Sixth Committee should be investigated.

22. **Mr. Galicki** (Poland) said that his delegation fully aligned itself with the statement made by the representative of the Netherlands on behalf of the European Union.

23. During the fifty-fourth session of the General Assembly, in his role as Chairman of the International

Law Commission, he had introduced the Commission's report, chapter IV of which carried the title "Nationality in relation to the succession of States". That report, which contained 26 draft articles on nationality of natural persons in relation to the succession of States, along with a preamble and commentaries, had been the result of six years of work by the Commission on the initial topic of State succession and its impact on the nationality of natural and legal persons. In the absence of positive comments from States, the Commission had concluded that they were not interested in developing the part of that topic dealing with the nationality of legal persons. The Commission had decided to recommend to the General Assembly that the draft articles on the nationality of natural persons in relation to the succession of States should be adopted in the form of a declaration.

24. In its resolution 54/112, the General Assembly had decided to consider the draft articles at its fifty-fifth session, with a view to adopting them as a declaration. It had invited Governments to submit comments and observations on the question of a convention on nationality of natural persons in relation to the succession of States, with a view to the General Assembly considering the elaboration of such a convention at a future session.

25. During the fifty-fifth session of the General Assembly in 2000 the Sixth Committee had considered the item, and the coordinator of informal consultations on the topic had reported that although there was significant support among delegates for the adoption of the declaration, a number of delegates had preferred to take a step of a lesser legal order at that stage. Some degree of support had also been expressed for the adoption of a convention in due course.

26. On the recommendation of the Sixth Committee, the General Assembly had adopted resolution 55/153, taking note of the draft articles on nationality of natural persons in relation to the succession of States that had been drawn up by the Commission and annexed to the resolution. In that same resolution, the Assembly had invited Governments to take into account, as appropriate, the provisions contained in the articles that dealt with issues of nationality of natural persons in relation to the succession of States.

27. Although nationality was essentially governed by national legislation, the competence of States in that area could be exercised only within the limits set by international law. As a result of the development of human rights law since the Second World War, the traditional approach, based on the preponderance of the interests of States over those of individuals, had given way to a balancing of the legitimate interests of both States and individuals; that had been taken into account in the preamble to the draft articles. The preamble had expressed the Commission's fundamental concern for the protection of the human rights of persons whose nationality might be affected following a State succession. The preamble had been based essentially on the preambles to the 1978 and 1983 Vienna Conventions on the Succession of States.

28. The scope of application of the draft articles was limited, *ratione personae*, to the nationality of natural persons and did not extend to the nationality of legal persons. *Ratione materiae*, the draft articles encompassed the loss and acquisition of nationality, as well as the right of option, as far as they related to situations of succession of States. *Ratione temporis*, the scope of application of the draft articles covered the period in which changes of nationality resulting from the succession of States might occur.

29. It appeared that the Committee had three options. The first was to leave the issue as it was and to take no new action on the Commission's draft articles. The draft articles, which in formal terms were only an annex to the resolution and had no legal force, were nevertheless recognized by the international community as an important step in the codification and progressive development of international law.

30. Another option was to recommend that the General Assembly should adopt the draft articles in the form of a declaration, as the Commission had proposed in 1999. That would give them a higher legal status, though they would remain "soft law", creating no formal legal obligation for States regarding nationality in relation to the succession of States. Adopting a declaration would remove the possibility of further discussion of the topic.

31. The third option — the most ambitious, although also the most difficult to achieve — was to transform the Commission's codification work into a binding international treaty. The principles and rules which the Commission had drawn up would then become binding on the States parties.

32. Practice showed, however, that that draft articles prepared by the Commission were not directly

transformed into treaty provisions; instead, they were usually reformulated by special bodies, such as international conferences, ad hoc committees and working groups. During that process the draft articles underwent substantial change. A comparison of the Rome Statute of the International Criminal Court with the Commission's original draft illustrated that evolution.

33. In promoting a higher legal status for the draft articles, care must be taken to retain their original substance as far as possible. It would not be easy to choose from the options described, especially the last two. In 1999, Mr. Bernd Niehaus, then the representative of Costa Rica in the Sixth Committee, had said that while a treaty would have the advantage of being more binding, a declaration could serve as an inspiration to the progressive development of customary international law.

34. For the purposes of drawing up a treaty it must be considered that Part 1 of the Commission's draft articles contained principles of a general character which applied to all categories of succession of States. Those general principles deserved to be enshrined in an international convention. Any instrument adopted by the United Nations should reflect three elements, namely: (1) the recognition of the human right to a nationality; (2) the need to avoid statelessness; and (3) respect for the will of the persons concerned in deciding on matters of nationality in connection with the succession of States.

35. Those three elements could be reconciled with the inherent right of each State to determine who its citizens would be. The growing concern of the international community with finding legal solutions to the sensitive and complex problems of nationality in connection with the succession of States and the desire to respect human rights combined to give additional impetus to the search for a balance between the rights and interests of individuals and of States. The Commission's draft articles could well serve as a basis for such a solution.

36. **Mr. Ouaraga** (Côte d'Ivoire) said that the right to a nationality was without any doubt one of the fundamental human rights of all natural persons. His country assigned a constitutional status to that principle and supported all initiatives aimed at avoiding any situation of statelessness in which people might find themselves.

37. Côte d'Ivoire endorsed General Assembly resolution 55/153 on nationality of natural persons in relation to the succession of States in that nationality derived essentially from the domestic law of each State within the limits set by international law. His delegation was largely satisfied with the wording of the resolution since it was a liberal and balanced text. It also constituted a sound legal point of reference for the codification of rules dealing with the important issue of nationality of natural persons in relation to the succession of States.

38. As a former colony which had become a successor State upon gaining independence in 1960, Côte d'Ivoire attached particular importance to the resolution of that issue for three reasons: (a) more than 26 percent of its population was of foreign origin; (b) the controversy and passion that the issue of nationality generated in Africa was a recurrent problem that at times undoubtedly divided States as well as the people living within them; and (c) the final adoption of a resolution of that type would be an effective way to reduce the global risk of statelessness.

39. Côte d'Ivoire appreciated the helpful and important link that the resolution established between article 5, on presumption of nationality, and article 8, paragraph 2, and article 9, which embodied and preserved the sovereignty of the successor State within the limits of international law. The successor State did not have the obligation to attribute its nationality to persons who had their habitual residence in another State unless they would otherwise become stateless. All said, the successor State would have the power to make the granting of its nationality dependent on the renunciation by such persons of their nationality of another State.

40. His delegation fully shared the concerns expressed by Germany with regard to the tightening of the habitual residence criterion. That criterion should be formulated on the basis of indicators which took into account stability and genuineness, as well as attachment. Such a criterion constituted manifest evidence of the person's attachment to the successor State, apart from any legal tie, and for that reason deserved to be less strict and unattainable.

41. Obviously, under the laws of most States, nationality necessarily implied citizenship. Like most African laws, the Nationality Code of Côte d'Ivoire distinguished between nationality by attribution

(citizenship of origin) and nationality by acquisition (nationality obtained through naturalization or adoption). That distinction, which was not purely formal, entailed substantial and varied legal consequences for both categories of citizens. While nationality by attribution conferred on the holder the full enjoyment and exercise of all civil and political rights, nationality by acquisition introduced a relative restriction on those rights, since the persons concerned were subject to a trial period regarding their right to vote and to be elected.

42. Bearing that distinction in mind, the issue became whether the nationality affected by State succession was that of attribution or acquisition. The option of nationality by attribution for all without any other distinction as to status would amount to granting ipso facto and retroactively to persons in that situation, the right to vote and to be elected. It would cause problems in some States because, given the size of the foreign-born population in those States, that option could tip the electoral scale in some cases. The text of the draft articles would gain in precision if it distinguished clearly between the status of persons who previously held another nationality and that of children born in the successor State. Otherwise, there was a risk of the resolution becoming so politically charged as to depart from its original and presumptively noble goal of effectively reducing the global incidence of statelessness.

43. **Mr. El Jadi** (Libyan Arab Jamahiriya) said that the adoption of a convention on nationality of natural persons in relation to the succession of States was of particular importance because, as stated in the preamble to the draft articles, there was a need to ensure greater legal security for States and individuals. Addressing that issue and finding an appropriate solution would render an invaluable service to the international community because the loss of nationality endangered the human rights and fundamental freedoms of people who had lost their citizenship through State succession.

44. His delegation considered it important for the matter to be discussed in the Commission, with close attention to the observations and comments of those States that had experienced a succession. The consideration of specific cases and the sharing of different views relating to those experiences would enrich the debate on the draft articles.

45. The draft articles made no mention of the situation preceding their entry into force, a matter of great importance to people who had lost their nationality through State succession. His delegation agreed that international law should not be applied retroactively, particularly with respect to treaties governed by the Vienna Convention on the Law of Treaties; however, that should not keep the convention from applying to persons who had lost their nationality before its entry into force. The provisions of the convention could serve as guidelines for other regional or international courts and for arbitral tribunals. He proposed that States should implement those provisions until such time as the convention came into force.

46. **Ms. Zabolotskaya** (Russian Federation) said that States undergoing succession should institute the necessary measures, especially legislative ones, to ensure that people living in the territory affected by succession, and their status, were not adversely affected by such transformation. It was unacceptable for the lack of adequate norms to deprive increasing numbers of persons of the right to acquire citizenship. All persons had a right to a nationality and no one could be arbitrarily deprived of that right. The draft articles strengthened that fundamental principle and in that regard, article 5 on presumption of nationality was particularly important.

47. The best legal approach to resolving controversies over the nationality of natural persons in relation to the succession of States would be to conclude an international convention under the auspices of the United Nations which would give scope to the practice of States. If statelessness occurring in cases of State succession was to be avoided, account would have to be taken of the experience of other international organizations.

48. **Mr. Rodiles** (Mexico), emphasizing the importance of the topic of nationality of natural persons in relation to the succession of States, recalled that the right to a nationality was one of the most important human rights and the major premise for ensuring the effective legal protection of persons.

49. There were several reasons why the draft articles should take the form of a declaration by the General Assembly. A declaration could be a practical guide to finding normative solutions to issues arising from the nationality of natural persons in cases of State succession. Unlike a convention, which would require

a certain number of ratifications for its entry into force, the declaration would be applicable immediately following its adoption by the General Assembly. A declaration would contribute to the evolution of customary international law on the subject, to the extent that States would develop normative criteria for resolving cases based on those already dealt with in the draft articles.

50. The provisions designed to prevent cases of statelessness in relation to the succession of States would be counted as the greatest legacy of the Commission's draft articles, and priority must be given to establishing clear rules in that regard.

51. **The Chairman** said that the Committee had concluded its consideration of agenda item 138.

Agenda item 139: Responsibility of States for internationally wrongful acts

52. **Ms. Noland** (Netherlands) said that the draft articles on responsibility of States were frequently used in practice as the most authoritative source of norms in relation to State responsibility. International tribunals such as the International Court of Justice and the European Court of Human Rights had cited the draft articles in their judgements and advisory opinions, demonstrating the widespread recognition and importance that the draft had acquired in the few years' time since its conclusion.

53. The possibility that the draft articles might be adopted in the form of a universal convention could not be ruled out. Nevertheless, her delegation had some doubts as to the appropriateness of elaborating a convention at that time. To do so might undermine the common ground on which the text of the draft articles was based; there was a possibility that the convention might not enter into force or might not achieve a universal or quasi-universal status; and the inclusion in the articles of a dispute settlement mechanism raised difficulties. Most of the articles reflected customary international law; their incorporation into a convention would contribute little to the progressive development of international law. The remaining articles could be considered as related to progressive development; in that connection, State practice would contribute significantly to the development of customary international law in that area, and more time was needed for that to happen.

54. State responsibility for internationally wrongful acts was a matter of great importance, and States should continue to acquire greater experience in that regard through the practical application of the draft articles. Her delegation therefore believed that the topic should not be considered again until the sixty-third session of the General Assembly.

55. **Mr. Romeiro** (Brazil) said that the draft articles had sought to achieve a balance in the central debate concerning the nature of obligations between States in view of the growing need for accountability to the international community as a whole, as enshrined in the Vienna Convention on the Law of Treaties.

56. The draft articles should be adopted in the form of an international convention and an international conference of plenipotentiaries should be convened to that end. Bearing in mind the concerns expressed about the need for States to have adequate time to evaluate and consider the finished text, his delegation was open to suggestions that the General Assembly should take a step-by-step approach to the issue. His delegation would have preferred for the draft articles submitted by the Commission to include provisions on the peaceful settlement of disputes.

57. **Mr. Yamada** (Japan) recalled that, during the fifty-sixth session, his delegation had expressed the hope that the draft articles would be applied in State practice and in the decisions of international judicial bodies while States studied the draft articles and the commentary. It was encouraging to note that since then the draft articles had served as a guide for States and international judicial bodies on a number of occasions.

58. The adoption of the draft articles would contribute greatly to the development of international law by serving as a legal basis for the analysis of relations between States. The time was not ripe, however, for the convening of a diplomatic conference to adopt the draft in the form of a convention. It would be prudent initially to see how State practice and the jurisprudence of international courts reflected the ideas contained in the draft articles. Disputing States were always entitled to refer to specific parts of the draft articles as applicable law in their particular case. If States were able to find a common ground for much-debated areas through observation of practice and judicial decisions, it would become much easier to reach consensus on how the current draft should be revised or maintained. Japan would therefore prefer to

wait four or five more years before the General Assembly took up the matter again.

59. **Mr. Jia** Guide (China), emphasizing the importance for international law of the draft articles on responsibility of States for internationally wrongful acts, commended the work of the Commission, and said that his delegation had no objection to the convening of a diplomatic conference to examine the draft articles with a view to concluding a convention. What was involved was a very complex question affecting the interests of States. The draft articles had yet to satisfactorily address the concerns of a number of countries on very controversial issues such as "serious breaches of obligations under peremptory norms of general international law" and "counter-measures".

60. Any substantive action on the draft articles must be based on thorough consideration, adequate preparations and consensus. As conditions were not yet right for the convening of a diplomatic conference, the topic of State responsibility for internationally wrongful acts should be included in the agenda of the General Assembly on an annual or biennial basis, and a working group of the Sixth Committee could be set up so that members could exchange views on relevant issues and on ways to solve them, with a view to reaching a decision on action to be taken when conditions were propitious.

61. **Mr. Rosand** (United States of America), while emphasizing the Commission's contribution to international law in the area of responsibility of States for internationally wrongful acts, said that no further measures were needed in that regard. The draft articles, in their current non-binding form, had proved useful as a guide for States and other international bodies. For that reason, and because it had doubts concerning the usefulness of adopting new measures on the topic, his delegation was opposed to the convening of a diplomatic conference to conclude a convention on State responsibility.

62. **Mr. Chushev** (Belarus) said that, to encourage wider implementation of codified norms on the topic, the possibility of adopting the draft articles in the form of a convention should be considered. Such a document would strengthen international law and the international system. Moreover, the contribution of the United Nations to establishing the rule of law in relations between States would become effective only when the results of its efforts in the codification and progressive development of international law were embodied in an internationally binding document. The convening of a diplomatic conference with a view to adopting a convention would help to increase State participation in developing and strengthening the draft articles.

63. Generally speaking, the draft articles were balanced and impartial. A number of provisions, however, warranted further attention. The rules granting any State other than the injured State the right to invoke the responsibility of another State which breached its obligations to the international community as a whole (obligations *erga omnes*) needed to be analysed in greater depth. Until then, there had been no universally accepted list of rights and responsibilities *erga omnes*, leaving the way open for abuses. If the rules in question were to be retained in the draft articles, consideration would need to be given to the possibility of including a clear definition of obligations to the international community as a whole. Otherwise, such rules should be deleted or replaced by provisions defining the concept of *erga omnes*, for example, provisions which did not permit any State to invoke the responsibility of another State for failing to comply with the peremptory norms of international law (*jus cogens*).

64. One of the most controversial aspects of the draft articles was the taking of countermeasures in respect of an internationally wrongful act of a State. Such action was a legitimate way of inducing a State to comply with its obligations. However, given the existing inequality between States, the right to take countermeasures could intensify abuses by more powerful States. To prevent that, it was necessary to identify loopholes in the regime limiting countermeasures as outlined in Part Three, Chapter II, of the draft articles. Chapter II contained progressive elements which prevented subjectivity in the application of countermeasures especially with regard to the proportionality of countermeasures in respect of damage caused by an internationally wrongful act. If consensus was reached on the elaboration of a convention based on the draft articles, it would be important for that convention to include provisions relating to the settlement of disputes, including disputes resulting from the taking of countermeasures.

65. **Mr. Lenk** (Israel), while emphasizing the huge achievement which the conclusion of the draft articles

on responsibility of States for internationally wrongful acts represented, said, with regard to the final form of the draft articles, that it would be premature to convert them into a treaty. Instead, they should be left in their current state, while efforts to test their usefulness in international theory and practice continued. While some of the articles had withstood that test well, others had been questioned by States and scholars owing to shortcomings in such areas as the treatment of countermeasures, the dual regime on legal consequences which still bore the scars of the long battle over crimes and delicts, and the invocation of responsibility by non-injured States, which in his delegation's view did not reflect customary law.

66. The draft articles had been prepared as a body of secondary rules that applied, with the exception of *lex specialis* regimes, across the entire spectrum of primary international obligations. Given that international relations and the international legal order were in a constant state of flux, it would be counterproductive to try to establish immutable rules regulating the entire corpus of international legal obligations. The clarity provided by the Commission's draft was welcome; the rigidity inherent in its codification in treaty form, less so. Paradoxically, the adoption of a convention, particularly if it received few ratifications or was partly controversial, could diminish the importance of the draft articles. It would therefore be far more beneficial to retain the current flexible form and use the draft articles as a record of international legal development and a guide for States and international judicial bodies, especially as it could be argued that the true value of the draft articles lay not in their rudimentary and somewhat abstract provisions, but in the commentary, which shed light on the history, scope and purpose of each of the rules. In fact, his delegation recommended exploring ways in which to disseminate the commentary, and not just the draft articles, more widely.

67. The adoption of the text as an international treaty would be premature and unwise. If the draft articles were thrust into the arena of multilateral negotiations, political clashes and compromises, and "creative" drafting, it was doubtful whether the result would enhance their status or further advance the rule of law in international relations.

68. **Mr. Wood** (United Kingdom) said that the draft articles represented the culmination of 45 years of work by the Commission, States and the five Special Rapporteurs and were one of the Commission's great successes. The draft articles, which had already become the point of reference whenever States or international courts were faced with issues of State responsibility, represented an authoritative statement of international law on the matter and were referred to both by international courts and tribunals and by writers. In the few years since the conclusion of the Commission's work and the adoption of General Assembly resolution 56/83 on 12 December 2001, the draft articles had gained wide recognition.

69. The approval of the draft text had not been an easy task. Even though the draft articles included elements of progressive development, they were largely an essay in codification based on fragile compromises. They were not wholly satisfactory to any State in particular, but had nonetheless been accepted by the international community as a whole. Such an important achievement should not be put at risk lightly.

70. Some countries believed that it was desirable to continue working towards embodying the draft articles in a convention. However, he urged them to reflect carefully on the risks involved and to consider whether the supposed advantages outweighed the disadvantages. The main risk was that of reopening old and fruitless debates and ending up with new disagreements that could weaken the current consensus. If the convention received few ratifications, it could have less legal force than the draft articles. Furthermore, it might stifle the development of the law in a field which had always been characterized by State practice and case law. A convention would not bring much added value, as the articles annexed to Assembly resolution 56/83 were already proving their worth and entering the fabric of the law through State practice, court decisions and the teachings of scholars. It was instructive to compare and contrast State immunity and State responsibility, which were very different topics. State immunity arose largely between private parties and States and was argued in domestic courts. Where domestic courts applied international law directly, they might well need the clarity that a convention brought. State responsibility, however, operated at a different level: directly between States, and in international courts and tribunals, both of which were well equipped to deal with general international law, as reflected in the draft articles and the case law and State practice built upon them.

71. It was unwise to consider moving towards a convention on State responsibility, as that could cause the text to unravel and result in a convention with few ratifications. The draft articles should, therefore, remain in their current form and not be discussed by the Committee again until the sixty-third session. That would allow adequate time to gain further experience in working with the draft articles and consolidate the Commission's great achievement.

72. **Ms. Sotaniemi** (Finland), speaking on behalf of the five Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said that the adoption of the draft articles as an annex to General Assembly resolution 56/83 had come as a disappointment to some, who felt that it was too modest an ending after 50 years' work. The Nordic countries did not share that view and continued to believe that the chosen solution was the best possible one. Three years after the adoption of the resolution, the draft articles had become the most authoritative statement available on questions of State responsibility. International courts, such as the International Court of Justice and the European Court of Human Rights, had referred to the draft articles in their judgements. The content of the draft articles could not be overridden by conventions or customary practices or by General Assembly resolutions or general principles of law. On the contrary, the draft articles were, for the most part, the expression of customary law in the matter. Accordingly, they should not be weakened by the compromises and agreements that would be a necessary part of a diplomatic conference dedicated to the preparation of a convention. Opening negotiations would probably endanger the current fragile equilibrium. It was not advisable to begin negotiations on a convention on responsibility of States for internationally wrongful acts. However, the item should remain on the agenda of the General Assembly so that it could be considered again, preferably not before the sixty-third session.

73. **Mr. Serradas Tavares** (Portugal) said that the issue of the State responsibility for internationally wrongful acts deserved to be incorporated into a legal instrument that would make a decisive contribution to respect for international law and to peace and stability in international relations. The draft articles on State responsibility should constitute the third pillar of the international legal order, together with the Charter of the United Nations and the law of treaties, the latter having already been codified in the Vienna Convention of 1969. States must not be over-cautious in their approach to the issue, since the only concern was to establish the consequences of internationally wrongful acts, not to define what was meant by a wrongful act. State responsibility was related only to secondary rules, not to the primary rules defining the obligations of States. It would be senseless to hold up development and codification work in that area while continuing to advance in others, such as diplomatic protection and the responsibility of international organizations, when the general principles applicable to all those areas were identical.

74. In response to the numerous calls from the General Assembly to expedite the study of the topic and continue to give it priority attention, progress must be made towards the preparation of a convention. In its resolution 56/83, the General Assembly had welcomed the conclusion of the work of the International Law Commission on responsibility of States for internationally wrongful acts and its adoption of the draft articles and also stated that they had been annexed to that resolution without prejudice to their future adoption or other appropriate action. Immediate action was needed. Several options were available: preparing a convention on the topic; setting up an ad hoc committee to work on that option; or requesting States to submit their final observations on the issue within a fixed deadline.

75. **Mr. Economides** (Greece), referring to the main positive elements of the Commission's draft articles on State responsibility, mentioned first the codification of customary rules on the topic, a creative and extremely difficult task that had made it possible to bridge the existing gaps in international law with a valuable text. That text, which gave comprehensive, valid and genuine expression to current international norms on State responsibility, was used by, inter alia, the International Court of Justice. The second positive element was the use of the notion of the international community as a whole, which appeared in article 33, paragraph 1, in which a distinction was made between the obligations of the responsible State owed to another State, to several States or to the international community as a whole, and also, either implicitly or explicitly, in articles 42, 48, 40 and 41. Consequently, and in accordance with the aforementioned provisions, in the event of a breach of international obligations owed to the international community as a whole, States

specifically affected by the breach could invoke responsibility as injured States, while all the remaining States were entitled, if not obliged, in the case of the obligations of a universal nature provided for in article 41 of the draft, to take collective or individual action against the responsible States in order to enforce respect for the law for the benefit of the general interest, namely, the international community as a whole.

76. The third positive element was the *jus cogens* norms, i.e., the peremptory norms of general international law, enshrined for the first time in the Vienna Convention on the Law of Treaties of 1969, which had now become part of the international order. They created obligations of higher rank than any other international obligation that might conflict with them, regardless of whether that obligation arose from a convention, from customary or institutional law, or from any other source. The draft articles dedicated a number of significant provisions to those norms, such as articles 26, 40 and 41 and a large section of article 50, and also served to strengthen an institution based on the notions of democracy and justice which had been introduced with a view to providing legal protection for the essential interests of the international community, i.e., the interests of all States, particularly the weakest.

77. The fourth positive element in the Commission's draft articles was the regime of specific responsibility for serious breaches of obligations under peremptory norms of general international law (articles 40 and 41). That regime, which was the draft's most significant innovation, imposed on all States three concrete obligations in favour of the injured State and against the responsible State, namely: States must cooperate to bring to an end through lawful means any serious breach within the meaning of article 40; no State should recognize as lawful a situation created by a serious breach of that nature, and no State should render aid or assistance in maintaining that situation. Consequently, any State committing such a serious breach would now be faced not only with the injured State but with all the States of the international community.

78. The fifth positive element of the draft articles was the development, strengthening and modernization of the law governing the international responsibility of States. On one hand, the responsibility regime was no longer unique, since a specific regime was being added to the general one. On the other hand, the classic bilateral relationship which the law on responsibility established exclusively between the injured State and the responsible State ceased to exist, in respect not only of serious breaches of obligations derived from peremptory norms of general international law, but also of all collective obligations and, in particular, obligations contracted with the international community as a whole. Draft article 48 authorized States acting to protect a collective interest to exercise all the rights granted to injured States, apart from the possibility of taking countermeasures. There was thus a gradual shift from the individual to the collective in the law governing State responsibility, which was called upon to play an increasingly significant positive regulatory role in the resolution of multilateral and global problems and, in general, in the protection of international lawfulness. Another positive element was that the Commission's draft articles did not address the notion of damage as a requirement for the invocation of responsibility. It emerged from article 1 of the draft, which stated that "every internationally wrongful act of a State entails the international responsibility of that State", that the requirement of damage, where necessary, depended on the applicable primary norm referred to in the draft articles (articles 1 and 2). Accordingly, that requirement, where necessary under the primary norms, was not affected. In addition, that provision served to emphasize that many international obligations, for instance those with negative results, could be breached and give rise to responsibility even though no material or moral damage had been caused. Thus, by highlighting the exclusively legal context, the Commission was promoting respect for the rule of law, the protection of which it guaranteed.

79. With regard to the negative aspects of the draft, it did not dedicate any provisions to obligations of means and obligations of result, a distinction that was significant and clearly useful in relation to the law governing the international responsibility of States. However, there were two even more negative elements, the first being the predominance of the unilateral taking of countermeasures over the obligation to settle disputes. Countermeasures, an archaic and retrograde practice that enabled States to take justice into their own hands, favoured powerful nations and undermined the authority and prestige of international law. However, article 52, paragraph 2, of the draft went even further, authorizing the injured State to take "such urgent countermeasures as are necessary to preserve its

rights", even where the State regarded as responsible had denied responsibility and agreed to submit the dispute to an international arbitral or judicial body. He regretted the inclusion of that provision, which accorded absolute priority to unilateral action by the injured State — action that could, when all was said and done, be unfounded — instead of to the settlement of the dispute in accordance with international law.

80. The draft was also deficient in its lack of procedures for settling disputes that might arise from the interpretation or application of its provisions. Such procedures would have been most useful to the law of the international responsibility of States as a whole and indispensable to the part relating to countermeasures. It was worth noting that the draft adopted by the Commission on first reading had included a third part devoted to the settlement of disputes (articles 54 to 60, followed by two annexes). In the end it had not been retained, which left a significant gap.

81. If the positive and negative aspects of the draft articles were compared, the balance was clearly positive. The draft — essentially a work of codification and, to a lesser extent, of progressive development of the law — represented a clear step forward that would prove beneficial to States and the international community. The only possible option was the adoption of an international convention. The adoption of an international convention binding upon the parties would confirm and consolidate the customary provisions of the draft and make obligatory the new provisions deriving from the progressive development of the law. An international convention, even if it received few ratifications, was the best solution as its authority was infinitely greater from all points of view than that of a non-binding text. The General Assembly was the body responsible for transforming the Commission's draft into an international convention. It was essential to maintain the entire draft, which contained various important compromises with regard to complex and controversial questions that must above all be maintained. Ideally, therefore, the Assembly should establish a working group entrusted with three specific tasks: to draft a preamble, to elaborate the final clauses of the instrument and to establish a dispute settlement mechanism. The Commission had already brought that question to the Assembly's attention.

82. **Mr. Špaček** (Slovakia) said there was no doubt that the responsibility of States for internationally wrongful acts was one of the most important topics completed by the Commission in its 56-year history. The draft articles on State responsibility were indeed one of the Commission's landmark codification activities. The text of the draft articles bridged a gap that had existed for a long time in the field of the codification of international law.

83. Slovakia considered that the articles on State responsibility were a well-thought-out exposition mainly of customary international law with a few important elements of progressive development. Most of the articles relied heavily on extensive State practice and the jurisprudence of international courts and arbitral tribunals, as demonstrated by the very useful commentaries. In 2001 the Committee had wisely decided not to begin commenting on the articles or discussing their content or substance. It had allowed a period of three years to evaluate the impact of the articles on State practice and to assess whether States had made use of them in their relations with other members of the international community, whether international courts or tribunals referred to and applied them in discharging their adjudicative or advisory functions, or whether there were aspects with which they disagreed. The Commission's draft articles on State responsibility had been exceptionally well received by the international community. They were widely referred to in the practice of States and international courts, and in international jurisprudence, for example, in recent decisions of the International Court of Justice or other international courts, including the European Court of Human Rights.

84. With regard to the draft articles, the recommendation formulated by the Commission in 2001 had proposed a clear two-stage approach. In the first stage, without any specific time limit, the articles should be tested and given the opportunity to gain universal recognition. In the Commission's view, the second stage might consist in the convening of an international conference of plenipotentiaries to examine the articles with a view to concluding a convention on the topic.

85. Slovakia held that, in the light of the importance of the articles and the topic itself, it would be premature to enter into negotiations on a convention. The Commission's draft articles on State responsibility required substantial and extensive recognition in the field of international legal relations. The international community needed more time to determine the best

approach to finalizing the Commission's work and the final form of the actions to be taken. Accordingly, the General Assembly should return to the topic, perhaps in three or four years, in order to evaluate it and consider the future of the draft articles, bearing in mind the option of adopting them in the form of a convention in the future.

86. **Mr. Playle** (Australia), speaking also on behalf of Canada and New Zealand, said that those countries were well aware that the Commission's articles on State responsibility had been almost 50 years in the making. Over that period, the Commission had had to grapple with the codification and development of one of the most complex and challenging areas of international law. Thanks to such efforts, the Committee had before it a comprehensive and finalized set of draft articles and commentaries. Those articles, as the product of thorough legal analysis and close consultation, had already introduced greater clarity and precision into the law of State responsibility.

87. An important choice was at hand: whether to adopt the results of the Commission's work as a convention or in the form of a resolution or declaration. Australia, Canada and New Zealand had long preferred the second option. It would therefore come as no surprise that they continued to support the Commission's recommendation on the appropriate form that the articles should take. They would support the adoption of a resolution incorporating the articles in the form of an annex or a declaration. Arguments supporting the adoption of the articles in that manner were clear and compelling; first and foremost, that approach would ensure that the integrity of the articles was maintained.

88. Australia, Canada and New Zealand sought to avoid any measure that would lead to the reopening, renegotiation or unravelling of the draft articles, or any situation that would entail a weakening of the articles on account of an unsuccessful convention with a low rate of ratification. On the contrary, it was necessary to safeguard the benefits of the progress made by the Commission during its 50 years of important work on the subject.

89. The draft articles had become a persuasive authority as many of them grouped together existing customary international law. The International Court of Justice had referred to them on a number of occasions, most recently in its advisory opinion on the "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory". Other international tribunals had followed suit, demonstrating that the articles would have a long-term influence even if they did not take the form of a convention. In fact, adoption by means of a consensus resolution would ensure the universality of the articles and render them more prominent, persuasive and relevant in the future.

90. As to whether the articles should contain a dispute settlement mechanism, such a mechanism would not be needed if the articles were adopted by way of a resolution. Reliance should instead be placed on existing dispute settlement mechanisms, such as the application of the so-called optional clause of the Statute of the International Court of Justice, and on recourse to other relevant tribunals, such as the compulsory jurisdiction of the International Tribunal for the Law of the Sea.

91. Australia, Canada and New Zealand considered that the most practical, realistic and effective option would be to adopt the articles as a resolution and to rely on the international tribunals and State practice and doctrine to adopt and apply the rules contained therein. Adopting the articles as a treaty would be too risky. It was timely and appropriate for the General Assembly to adopt such a resolution during its current session.

92. **Mr. Tuerk** (Austria) said that the draft articles on the responsibility of States for internationally wrongful acts were one of the most outstanding contributions that the Commission had made to the codification and progressive development of international law, as they went to the root of the international legal order and formed the basis of the whole system of international law. In addition, they applied to all substantive fields of international law, in that whatever matters the substantive rules of international law addressed, the rules on State responsibility applied to breaches of those rules.

93. The Commission had taken more than 40 years to achieve the final result which it had presented to the General Assembly in 2001. International law had changed considerably over that period and the Commission had been forced to keep pace with developments. A comparison of the text achieved after the first reading with the final text clearly illustrated those various changes and the text mirrored the current State of the international legal order. In cases where the

Commission characterized one or another provision as constituting progressive development of international law, the provisions had been carefully drafted so that future developments would not be prejudged.

94. The draft articles on State responsibility, the great authority of which derived not only from the high qualifications of the Special Rapporteurs, but also from their substance, had already received broad attention in international practice and doctrine. The International Court of Justice had referred to the articles on various occasions and States frequently relied on them in their argumentation in international relations. The General Assembly had rightly commended them to the attention of States in its resolution 56/83. It would be difficult to imagine how the system of international law could function without the regime on State responsibility drafted by the Commission.

95. One of the main questions on which discussions in the Commission and the General Assembly had focused was the legal form which the draft articles should take. Arguments had been made in both directions, favouring either a non-binding instrument or a convention. The Commission had remained undecided although a preference for a non-binding instrument could be discerned in its report of 2001. It would be out of place to restate the arguments advanced therein. The Commission had reached the understanding that, in the first instance, it should recommend to the General Assembly that it take note of the draft articles in a resolution and annex the text of the articles thereto. It had also been proposed that, in the light of the importance of the topic, the Assembly should consider the adoption of a convention on the subject at a second and later stage.

96. After thorough consideration of the matter, the Austrian delegation favoured the adoption of the draft articles on the responsibility of States for internationally wrongful acts in the form of a convention. The articles were a basis of international law similar to the Vienna Convention on the Law of Treaties, for that reason, they should receive the same treatment. Without a binding commitment, some States might not feel obliged to comply with the articles and would feel free to apply different regimes and concepts of State responsibility, thus impairing the valuable work of the Commission. Only with a legally binding instrument could the attitude of States regarding their responsibility become stable and predictable.

97. The current reality, however, was that a number of States were reluctant to adopt a convention on the subject of State responsibility. The drafting of a convention would require substantial efforts by all States and additional work had still to be done for that purpose. The question of dispute settlement would also arouse controversy. For all those reasons, and since there was no immediate need to open the Commission's text for signature, Austria remained flexible and suggested that the question should be considered again no later than the sixty-second session of the General Assembly. The most important thing was to avoid changing the carefully elaborated balance among the articles. Accordingly, his delegation would resist any attempt to make substantive changes to the text, as that would jeopardize the results achieved to date.

98. **Mr. Romeu** (Spain) said that the preparation of draft articles on the responsibility of States for internationally wrongful acts constituted a milestone in the codification and progressive development of international law. Having an adequate body of laws in the matter was an indicator of the development of a legal system. The articles reflected to a large extent widely accepted customary norms and also constituted a benchmark in the judicial practice of such bodies as the International Court of Justice and arbitral tribunals.

99. That notwithstanding, recourse to the doctrinal value of such a text should only be a stopgap measure. Only an international legal instrument, preferably a codification convention, could provide adequate legal security. For that reason, the General Assembly would have to revert to the issue at its sixty-first or sixty-second session, with a view to laying the groundwork for the eventual convening of a diplomatic conference at which a convention that Spain supported could be negotiated and concluded.

100. **Ms. Rivera** (Uruguay) commended the work of the Commission on the topic of State responsibility for internationally wrongful acts, which represented significant contribution to the progressive development and codification of international law. The draft articles contained and codified norms of international customary law and also reflected State practice as well as doctrinal interpretation and jurisprudence. Generally, Uruguay agreed with the way in which the basic rules regulating the international responsibility of States for wrongful acts had been codified and the

manner in which innovations to promote their progressive development had been introduced.

101. The draft articles contained provisions that regulated extremely important issues which should be carefully considered and discussed. The time had come to explore the possibility of convening an international conference of plenipotentiaries to consider the text with a view to concluding a convention in the matter. The conference would be a good opportunity to evaluate the extent to which dispute settlement provisions might be incorporated into the draft articles. As a traditional defender of arbitration, Uruguay would consider with interest the proposals that would be submitted in that regard.

102. **Ms. Mas y Rubi Sposito** (Bolivarian Republic of Venezuela) commended the Commission's work in the development and codification of international law on responsibility of States for internationally wrongful acts. Such acts should include responsibility of States for the actions of transnational corporations linked to them either by their nationality or that of their majority stockholders or of the decision makers in their administration. Furthermore, the extraterritorial application by States of illegal provisions of their domestic law that caused harm to other States must be defined as illegal. The draft articles must be carefully examined and discussed.

103. Her delegation supported the holding of an international conference of plenipotentiaries to examine the draft articles of a future convention on that topic, but only when the draft had reached the stage where it could be discussed at that level. She agreed with the Committee's recommendation that such a conference would provide a good opportunity to evaluate whether it would be appropriate to include dispute settlement provisions in the draft. Her delegation supported voluntary arbitration as a legal formula for the settlement of disputes in international law.

104. **Mr. Lavalle** (Guatemala) said that the basic problem posed by the draft articles on responsibility of States for internationally wrongful acts was that of the final form of the articles. There were only two possibilities: to convert them into a multilateral treaty of universal scope, or to make them a part of universal customary law. He preferred the second option for four reasons. First, the articles had already begun to move in that direction and some of their provisions had been mentioned by international courts or arbitral tribunals, or had guided the decisions of those bodies. Second, if the articles ended up as part of treaty law, it would not always be easy for the Commission's commentaries to be given the importance they deserved as criteria for interpretation. Third, if the articles acquired the standing of customary law they would immediately become binding on all States, whereas if they became a treaty, at least initially, they would be binding only on the States parties. Finally, their incorporation into international law as customary law would probably be simpler than the elaboration of a treaty. Few of the provisions of the 1996 articles would achieve that status alongside those of 2001, but their survival would be advantageous, especially that of articles 12 (mutatis mutandis) and 13, article 18, paragraph 5, and article 25, paragraph 5. Articles 16 and 17 should not be interpreted to mean that if the scenarios described therein were to occur, but if for the State which aided, assisted or participated in the "act" that was "internationally wrongful if committed by that State", the act was not wrongful, then the conduct should be considered lawful. Natural justice required that the conduct must, under any rule of general international law, be a wrongful act.

105. By definition, however, such conduct would be wrongful because it infringed a primary rule of international law, in which case the incident would not be covered by the articles mentioned. Nevertheless, if the scenarios described in articles 16 and 17 (with the exception of those referred to in paragraph (b) of both articles) occurred, then a primary rule of general international law would have been violated. It was difficult, therefore, to understand how there could be a violation not of a separate rule, but of one that was also part of general and primary international law, in cases in which all the hypotheses of one or another article were combined.

106. The question arose as to what that primary norm would be. If the norms established in articles 16 and 17 were secondary, it would not to be possible to find it. The only way out of that logical predicament was to attribute a primary character to the rules contained in the articles in question, which would imply that such rules were out of place in the draft articles.

107. It seemed odd that, in accordance with article 48, paragraph 2 (b), a State other than the injured State could, in the interest of the latter, claim from the responsible State the obligation of reparation. That

seemed to indicate that, in any case, a State other than the injured State automatically took on the character of agent of the injured State, without which the necessary measures could not be taken to enable the injured State to obtain the reparation owed to it. It might well happen, however, that the injured State either did not desire such reparation or had, in accordance with article 20, given its consent to the violation of international law that had caused the injury. Nevertheless, it was possible that the injured State might wish to act on its own behalf. For that reason he understood that, despite the provisions of paragraph (b), a non-injured State could not act on behalf of the injured State unless the latter authorized or gave its consent for that purpose. Similar although much more complex observations also could be made with regard to the power granted in paragraph (b) to a State other than the injured State to invoke the responsibility of the wrongdoing State on behalf of the beneficiaries of the obligation breached.

108. As for article 54, Guatemala believed that the Commission could have undertaken a measure of progressive development. The article could have provided that, if a State which applied *motu proprio* the penalties provided for in Article 41 of the Charter of the United Nations to another State which had not complied with the obligations imposed by the Security Council under Chapter VII of the Charter, the State taking the measures would be acting in accordance with the law even if the measures assumed non-compliance with an obligation imposed on it under international law vis-à-vis the State which was the object of the measures, as long as it was not one of the obligations specified in article 50, paragraph 1, of the draft articles.

The meeting rose at 1 p.m.